

(1929) 02 CAL CK 0005
In the Calcutta High Court

Rajendra Narayn Basu and Others

APPELLANT

Vs

Debendra Nath Mukhopadhyaya and Others

RESPONDENT

Date of Decision : 28-02-1929

Acts Referred:

Citation : AIR 1930 Cal 55

Hon'ble Judges : Mitter, J; Jack, J

Bench : Full Bench

Judgement

Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now respondents, for recovery of arrears of rent for the years 1328 and 1329 B.S. in respect of a certain putni tenure held by defendants 1 to 4 under them. The case made in the plaint is that Narendra who was a brother of defendant 1, and the father of defendants 2 to 4 was the proprietor of the zemindari under which the putni in question is held; that he sold the zemindari to the plaintiff and took the putni settlement from them in the benami of defendant 6 in 1319 B.S.; that the putni was sold in execution of a money decree against Narendra and it was purchased by defendant 1 to 4 in the name of defendant 5, wife of defendant 1 in the year 1917; that Narendra made a will by which he appointed defendant 1 as executor, that the money execution sale took place after the death of Narendra and the purchase was made by defendant 1 for self and as executor to the estate of Narendra, father of defendants 2 to 4; that shortly after the auction purchase defendant 5 executed a deed of release in favour of defendant 1, that the deed of release stated that the release was in favour of defendant 1 in his personal capacity as well as in his capacity as executor to the estate of Narendra, that defendants 1 to 4 defaulted in the payment of putni rent for the years in suit and hence the suit. The plaintiffs further alleged that they purchased the putni at a sale held under Regn. 8 of 1819 in 1331 for arrears of rent for 1330 B.S.

2. Defendant 1 did not contest the suit. Defendants 2 to 4 by their defence denied the relationship of the landlord and tenant with the plaintiffs, they contended that the putni in respect of which the present rent suit was brought

was the stridhan property of defendant 5.

3. The Munsiff held that defendants 1 to 4 were the real owners of the putni and as defendant 1 was discharged from his position as executor before the institution of the suit the plaintiffs' proper remedy was against defendants 1 to 4 personally. He accordingly decreed the suit against defendants 1 to 4, dismissing plaintiffs' claim against defendants 5 and 6 on the ground of want of cause of action.

4. Against this decision an appeal was taken by the defendants 2 to 4 to the Court of the Subordinate Judge of Murshidabad who has affirmed the decision of the Munsiff.

5. An appeal has been taken to this Court by defendants 2 to 4 against the decision of the Subordinate Judge and it has been argued by their learned advocate that as the rent for which the suit has been instituted accrued due during the period when defendant 1 was in charge of the estate as executor, he, defendant 1, was personally liable for the rent and as such the decision of the Courts below making the appellants liable for rent cannot possibly be sustained in law; and in support of this contention reliance has been placed on the case of *Farshall v. Farshall* [1871] 7 Ch. 123. The case of *Farshall v. Farshall* [1871] 6 Q.B. 346 is obviously distinguishable. There the executrix borrowed money from a certain bank for the purpose of paying the debts of the estate but she did not do so and in these circumstances it was held that the executrix was, personally liable. The true footing on which this case should be decided is this: The putni in question was purchased with assets which came into the hands of the executor at the time of death of the testator. The putni so acquired is as much assets of the testator Narendra as that which was in his possession at the time of his death see *Abbott v. Parfitt* [1871] 6 Q.B. 346. The putni was purchased by the executor defendant 1 in the ordinary course of his management of the testator's estate. It is not shown that the putni did not bring any income during the period when it was in possession of defendant 1 as executor. In these circumstances the executor defendant 1 is entitled to be indemnified out of the testator's estate against the liabilities which he has properly incurred.

6. It is contended that the indemnity should be limited to the putni acquired] by the executor and as the putni has all ready been sold the executor should be held personally liable for the entire rent. This contention is not, in our opinion, a sound one in view of the decision of the House of Lords in the case of *Dowse v. Gorton* [1891] A.C. 190. In that case a testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will and with the assent of the testator's creditors in the interest of the creditors as well as of the beneficiaries and was properly carried on and it was held that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its

form since the testator's death. It is not said in the present] case that in purchasing the putni the executor was doing any act which he was not entitled to do under any provision of the will of Narendra. I think the principle underlying the decision of *Dowse v. Gorton* [1891] A.C. 190, above referred to, applies to the facts of the present case. The plaintiffs with whom the executor contracted to pay rent stand in the shoes of the executor and have the same indemnity as the executor has against the testator's estate and the executor has a right to an indemnity out of the assets of the testator's estate which includes the after-acquired assets, namely, the putni. Once it is shown that the executor is entitled to be indemnified out of the estate of the testator, plaintiffs who have recovered judgment against the executor should have the benefit of this right to indemnity and should realise their dues from the assets of the testator. In this connexion the following observations of Byrne, J., in the case of *Raybold v. Turner* [1900] 1 Ch. 199, may be usefully referred to:

But the authority of *Benett v. Wyndham* [1862] 4 De. G. F. & J. 259, goes to show that if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do, instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate. I have the parties interested in defending the trust estate before me, and I have also the trustee and he claims indemnity, and, assuming that a proper case for indemnifying him is made out by the evidence, I think his claim should be allowed.

7. It is true that this was a case of tort by a trustee in the course of management of the trust estate. But we think the same principle ought to apply to a case where liabilities are incurred on the basis of a contract entered into with a third person in the course of management of the testator's estate, by the executor. It is also to be noticed that defendant 1 was discharged from executorship at the date of the institution of the suit and that prior to the suit the rights of defendant 1 and the appealing defendants had been adjusted by a partition deed. In this view we think that the Courts below have arrived at a right conclusion and this appeal must be dismissed with costs.

Jack, J.

8. I agree.